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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 09-3082

[Filed September 28, 2010]

Pamela Newberry,	)
	)
Appellee,	)
	)
v.	)
	)
Burlington Basket Company,	)
	)
Appellant.	)
	)

Appeal from the United States District Court
for the Southern District of Iowa.

Submitted: June 17, 2010
Filed: September 28, 2010

Before WOLLMAN, EBEL,[1] and COLLOTON, Circuit Judges.

[1] The Honorable David M. Ebel, Judge of the United States Court of Appeals for the Tenth Circuit, sitting by designation.

COLLOTON, Circuit Judge.

Burlington Basket Company ("Burlington Basket") appeals a jury verdict in favor of Pamela Newberry, a former employee who alleged that Burlington Basket violated the Age Discrimination in Employment Act ("ADEA") and the Iowa Civil Rights Act ("ICRA") by terminating her employment because of her age. Burlington Basket challenges the final jury instructions adopted by the district court,[2] and the court's award of attorney's fees. Because we conclude that the district court correctly instructed the jury under the ICRA, and did not abuse its discretion in calculating the fee award, we affirm.

I.

Pamela Newberry was born in 1953. She began working at Burlington Basket Company, a family-owned and operated manufacturer of wicker products, in 1995. Newberry was hired to assist the company's Controller, Del Moeller, with credit and collection tasks. She was later promoted to the position of Office Coordinator, and, in 2000, to Office Manager. Newberry became the company's Shipping Coordinator in 2004.

Moeller retired from Burlington Basket in 2005. Christopher Thompson, the twenty-seven year-old son of the company's CEO, was named Controller. In early 2007, Thompson and the other members of the company's Executive Committee (his father and two

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[2] The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

uncles) met to discuss a potential reduction in the work force, apparently in response to the company's financial difficulties. Thompson advocated that Newberry's employment be terminated. On February 14, 2007, Burlington Basket fired Newberry. The company retained three other office workers who were between twenty-two and thirty years of age at the time, even though each had fewer than five years of experience at the company.

Newberry filed suit in February 2008, alleging that Burlington Basket terminated her because of her age, in violation of the ADEA and ICRA. During a four-day jury trial in June 2009, Newberry presented evidence suggesting that Christopher Thompson was biased against older employees, and that he gave preferential treatment to younger workers. Burlington Basket asserted that Newberry was fired, while younger workers were retained, because Newberry was the least qualified. Newberry argued that the company's proffered reason was a pretext for age discrimination. She countered with positive evaluations in her personnel file, and testimony from her long-time supervisor regarding her qualifications. The jury found in favor of Newberry, and awarded her $25,000 in damages for emotional distress.

After the verdict, Burlington Basket moved for judgment as a matter of law and for a new trial. In the new trial motion, the company argued that in light of *Gross v. FBL Financial Servs., Inc.*, 129 S. Ct. 2343 (2009), which was decided the same day the jury reached its verdict, the court incorrectly instructed the jury to find that the plaintiff's age was "a determining factor" in the defendant's decision to terminate her employment if her age "played a part" in that decision.

The district court denied the post-verdict motions. The court also awarded Newberry $140,000 in attorney's fees and $5,332.71 in costs.

II.

We consider first Burlington Basket's objection to the final jury instruction concerning the standard of proof under the ADEA and the ICRA. In her complaint, Newberry alleged violations of both statutes. Consistent with our precedent prior to the Supreme Court's decision in *Gross*, the district court formulated a single set of jury instructions to cover both claims, and made no distinction between federal and state law. *See King v. United States*, 553 F.3d 1156, 1160 n.3 (8th Cir. 2009). Similarly, the jury verdict in favor of Newberry and the judgment entered by the district court did not differentiate between the two claims.

The district court charged the jury that Newberry had the burden to prove that her age was "a determining factor" in Burlington Basket's decision to fire her. The court then advised that Newberry's age constituted "a determining factor" if her age "played a part" in the company's decision to terminate her employment. The court further clarified that Newberry "need not prove that [her] age was the only reason for [Burlington Basket's] decisions, only that age was a determining factor by itself or along with other reasons for its decisions." Burlington Basket contends that this instruction was erroneous in light of the Supreme Court's decision in *Gross*. It does not appear from the record that Burlington Basket objected at trial to the challenged instruction, but Newberry does not assert on appeal that the company's claim was forfeited. We

will proceed as though the objection is preserved, because the preservation issue does not affect the outcome.

The challenged jury instruction was not a correct statement of the law under the ADEA after *Gross*. The ADEA makes it unlawful for an employer to take adverse action against an employee "*because of* such individual's age." 29 U.S.C. § 623(a) (emphasis added). To establish a disparate-treatment claim under the ADEA, "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross*, 129 S. Ct. at 2350. By requiring only that Newberry establish that her age "played a part" in the company's decision, and that it did so "along with other reasons," the instruction failed to communicate properly the "but-for" causation standard of the ADEA.

The district court evidently drew the "played a part" language from this circuit's model jury instruction that defines a "*motivating* factor" for employment discrimination claims under Title VII. *See* Eighth Circuit Manual of Model Civil Jury Instructions - Instruction 5.96 (2008). While Congress amended Title VII in 1991 "to allow for employer liability when discrimination 'was *a motivating factor* for any employment practice,'" it "did not similarly amend the ADEA." *Gross*, 129 S. Ct. at 2350 n.3 (quoting 42 U.S.C. § 2000e-2(m)). The ADEA provides for liability only when a defendant acts "because of" a plaintiff's age, and the jury instructions thus should not have applied what was in effect the "motivating factor" standard of Title VII.

Burlington Basket suffered no prejudice, however, because the challenged instruction was a correct

statement of the law under the ICRA. The ICRA, like the ADEA, provides for liability when a defendant discharges an employee "because of" age. *See* Iowa Code § 216.6(1)(a). Nonetheless, the Supreme Court of Iowa recently concluded, in a sex-discrimination action tried as a so-called "pretext" case, that an instruction derived from Eighth Circuit Model Civil Jury Instruction 5.96 on "motivating factor" was correct. *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 13 (Iowa 2009).

The instruction in *DeBoom* stated that a plaintiff satisfied her burden of persuasion by showing that a prohibited factor "played a part" in the adverse employment action, and that the factor "need not have been the only reason" for the employer's action. *Id.* The *DeBoom* instruction is thus virtually identical to that given by the district court in this case. The Supreme Court of Iowa held that the instruction correctly stated the law under the ICRA, and even recommended that the term "motivating factor" be used instead of "determining factor" in future cases. *Id.* at 13-14. The ICRA addresses discrimination based on "sex" and "age" in the same section, Iowa Code § 216.6(1)(a), and we see no reason to believe that the Iowa court would vary from *DeBoom* in an age discrimination case. Although the Iowa General Assembly has not amended the ICRA to change its long-standing "because of" standard to a "motivating factor" standard, we are of course bound to apply the Iowa court's statement of Iowa law in evaluating Newberry's state-law claim.

In *Gross v. FBL Financial Servs., Inc.*, 588 F.3d 614 (8th Cir. 2009), on remand from the Supreme Court, we concluded that *DeBoom* did not alter Iowa law governing the ICRA in a mixed-motive case, where the

employer's decision is the result of multiple factors, legitimate and illegitimate. *Id.* at 618-20. Burlington Basket expressly acknowledges, however, that this action was tried as a "pretext" case, and disavows any desire to convert it to a mixed-motive case. Appellant's Reply Br. 2-3. The issue at trial, therefore, was "whether either illegal or legal motives, but not both, were the true motives behind the decision." *Price Waterhouse v. Cooper*, 490 U.S. 228, 260 (1989) (White, J., concurring in the judgment) (internal quotation omitted). In that scenario, *DeBoom* establishes that the district court's instruction, drawn from the Eighth Circuit "motivating factor" model instruction, was correct under Iowa law.

After finding liability, the jury awarded Newberry damages of $25,000 for emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. Burlington Basket does not dispute that the jury instruction on damages correctly stated Iowa law, and the Supreme Court of Iowa has interpreted the ICRA to permit the award of compensatory damages for emotional distress in an employment discrimination action "without a showing of physical injury, severe distress, or outrageous conduct." *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 526 (Iowa 1990). Accordingly, the jury's award of damages is supported by the finding of liability under the ICRA, and the incorrect statement of the law under the ADEA did not prejudice Burlington Basket.

III.

Burlington Basket also objects to the district court's award of $140,000 in attorney's fees to Newberry. The

ICRA, like the ADEA, permits the district court to award "reasonable attorney fees" to a prevailing plaintiff. *See* Iowa Code § 216.15(8)(a)(8); *see also Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832 (Iowa 2009); *DeBoom*, 772 N.W.2d at 12. Burlington Basket argues that the award here is not reasonable. The company observes that the fee award is greater than the $25,000 in damages awarded by the jury, and contends that the award is excessive in light of the results obtained in this case and awards in similar cases. The company also asserts that the $140,000 figure is the product of duplicative billing by the two attorneys representing Newberry.

Because of the district court's "superior understanding" of the proceedings, and the prudence of "avoiding frequent appellate review" of such "factual matters," the Supreme Court has emphasized in cases arising under federal law that "the district court has discretion in determining the amount of a fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Although we consider here a fee award based on the ICRA, the standard of review is a procedural issue that is likely governed by federal law. *See Mayer v. Gary Partners & Co.*, 29 F.3d 330, 334 (7th Cir. 1994); *Felder v. United States*, 543 F.2d 657, 664 (9th Cir. 1976). In any event, Iowa law also calls for abuse-of-discretion review of fee awards, *Boyle*, 773 N.W.2d at 832, and we will review the district court's award under that deferential standard.

We conclude that the district court's award of $140,000 in attorney's fees, while generous, was not an abuse of discretion. The district court expressly considered the factors relevant to determining a reasonable fee award under Iowa law, and made

findings of fact regarding those factors. *See id.* at 832-833; *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897-98 (Iowa 1990). The court reviewed the detailed itemizations submitted by Newberry's attorneys, and found that they had performed the services they claimed. *See Boyle*, 773 N.W.2d at 832. The court found that none of the services was "excessive or exaggerated." The court examined the hourly rates charged by Newberry's attorneys, and determined that those rates were "not unreasonable in this case," even when compared with the lower hourly rates charged by Burlington Basket's attorneys. The court then used the itemizations indicating the hours reasonably expended by Newberry's attorneys together with their hourly billing rates to calculate an appropriate "lodestar" amount. *See Boyle*, 773 N.W.2d at 832; *Dutcher v. Randall Foods*, 546 N.W.2d 889, 896-97 (Iowa 1996). The court thus used an appropriate methodology and considered the relevant factors.

The court specifically addressed the issue of duplicative fees, finding that Newberry's two attorneys performed "some work that overlapped the other" and listed "several duplicate items" in their fee statements. On that basis, the court reduced Newberry's requested fee award by $13,465 to account for the duplication it identified. While another adjudicator might reasonably have reduced the fees further, the district court's decision was within the permissible range of discretion.

The district court also recognized that the damages found by the jury were "modest" and "less than plaintiff had sought," but awarded attorney's fees in an amount greater than the damages. This was

permissible under the ICRA, which does not require exact proportionality between a verdict and attorney's fees. *See Lynch v. City of Des Moines*, 464 N.W.2d 236, 238-39 (Iowa 1990). The district court based its fee award on reasonable grounds after an appropriate review of the relevant documentation from the parties. We cannot say that the court abused its discretion.

* * *

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-3082

[Filed September 28, 2010]

Pamela S. Newberry,	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
Burlington Basket Company,	)
	)
Defendant - Appellant	)
	)

Appeal from U.S. District Court
for the Southern District of Iowa - Davenport
(3:08-cv-00017-CRW)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

September 28, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

Civil No. 3-08-cv-17

[Filed August 14, 2009]

PAMELA S. NEWBERRY,	)
	)
Plaintiff,	)
	)
vs.	)
	)
BURLINGTON BASKET COMPANY,	)
	)
Defendant.	)
	)

ORDER DENYING MOTIONS FOR JUDGMENT NOV and NEW TRIAL and SETTING ATTORNEY FEES

On August 4, 2009, the court held a hearing, received arguments of counsel, and deemed submitted for ruling defendant's amended motion for judgment as a matter of law and alternative motion for new trial, as well as plaintiff's motion and supplemental motion for attorney fees and costs. A jury trial held on June 14 through 18, 2009, had resulted in special verdicts for Newberry and against Burlington Basket Company

(BBC), finding that Newberry's age was a determining factor in BBC's decision to terminate her employment, failure to transfer or consider her for other office jobs; and that Newberry sustained damages of $25,000 for emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life, but no lost wages. The jury found the BBC age discrimination conduct was "willful," but that did not enhance the verdict amount, because the jury found plaintiff lost no wages as a result of the wrongful termination.

The court had denied BBC's earlier motion for summary judgment, rejecting many of the grounds BBC urged during trial and now again in seeking judgment as a matter of law. The evidence during trial was not significantly different than the documentary evidence presented in summary judgment proceedings. The court dismisses BBC's post-verdict motions and decides Newberry's attorney fees, fixing a reasonable amount.

I. Motion for Judgment NOV. BBC contends the evidence was insufficient to support a factual basis for the jury's verdicts. Newberry's brief in resistance adequately rebuts each of the four factual bases for BBC's motion. Viewing the evidence in the light most favorable to Newberry and the verdicts, the court upholds the verdicts.

The jury could properly find Newberry's age, not the reduction in force, was a determinative factor in her being replaced with a younger person with less seniority, and that Newberry was qualified to perform the position that remained after the force reduction. The jury could properly find Newberry did not have to ask specifically to be transferred to the revised,

consolidated position, because BBC knew she was qualified and would have accepted the revised job. The evidence was sufficient to prove Newberry was willfully terminated because of her age, and indeed would not have been let go but for her age. The verdict will stand as a basis for judgment in her favor for $25,000, costs, and attorney fees.[1]

II. Motion for New Trial. The court's instructions were not flawed in the several respects raised in BBC's exceptions during trial and again in her new trial motion. To the extent Gross v. FBL Financial Serv., Inc., 129 S.Ct. 2343 (2009) clarified with somewhat different wording the test for proving causation in age-based discrimination cases, that decision was not decided until trial was nearly ended and was not cited to the court until post-verdict motions. The court believes the verdict would not have been different had the Gross wording been used in the causation instruction and the verdict form. Finally, the evidence about Christopher Thompson's so-called "stray remarks" was properly received over objection. Though initially ruled inadmissible before trial, the evidence at trial supported admissibility, demonstrating BBC had given Thompson considerable decision-making authority from the beginning of his employment as a BBC family member and that he had participated in the final decision not to keep Newberry as an employee.

III. Attorney fees. The court has applied to Newberry's attorney fees claim the several pertinent

---

[1] The court will grant reasonable attorney fees pursuant to 29 U.S.C. section 216 (b)

factors set forth in cases from the Court, such as Hensley v. Eckerhart, 461 U.S. 424, 430 n. 3 (1983), and cases decided in this Eighth Circuit. No two cases are alike, but several of the twelve factors quoted in Hensley are helpful here. The court believes Newberry's two attorneys did perform all the professional services they claim, as identified adequately in their two detailed itemizations. This information was very useful in calculating the "lodestar" amount. The court finds the hourly charges of about $250 and $200 per hour for the two lawyers, though higher than the hourly rates charged by BBC's attorney, were not unreasonable in this case. Each of Newberry's attorneys did some work that overlapped the other, and they listed several duplicate items. None of their services was excessive or exaggerated. In general, the triable issues were not especially novel or difficult. No unusual skills were needed to obtain the modest damages amount, a result less than plaintiff had sought. Considering all of the Hensley factors, and the pertinent arguments in the parties' extensive briefs and attachments, the court concludes Newberry is entitled to attorney fees in the amount of $140,000 for all services to date and payment of the entire Bills of Costs in the sum of $5,332.71.

IT IS SO ORDERED.

Dated this 14th day of August, 2009.

/s/ Charles R. Wolle
CHARLES R. WOLLE, JUDGE
U.S. DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

CASE NUMBER: 3:08-CV-00017

[Filed June 18, 2009]

PAMELA S. NEWBERRY,

Plaintiff

v

BURLINGTON BASKET COMPANY,

Defendant

JUDGMENT IN A CIVIL CASE

◉JURY VERDICT . This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

○DECISION BY COURT. This action came to before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

That Plaintiff shall have judgment for damages in the sum of $25,000 from Defendant. In addition, the Plaintiff shall receive costs and attorney fees and such other relief as may be awarded following hearing on August 4, 2009, at 3:00 pm.

Date: June 18, 2009

CLERK, U.S. DISTRICT COURT

/s/ Deborah M. Hanghian
By: Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

Civil No. 3-08-cv-17

[Filed January 30, 2009]

PAMELA S. NEWBERRY,

Plaintiff,

vs.

BURLINGTON BASKET COMPANY,

Defendant.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

On January 9, 2009, the court received arguments of counsel by telephone conference call on the motion for summary judgment filed by defendant Burlington Basket Company (BBC) in plaintiff Pamela Newberry's (Newberry) age discrimination lawsuit. Although BBC would prevail if genuine fact issues were decided in its favor, Newberry would likewise prevail if the jury resolves the fact issues in her favor. The court therefore denies BBC's motion for summary judgment.

Summary judgment is appropriate only when a party has demonstrated that it is entitled to judgment as a matter of law, with no genuine issues of material fact remaining for trial. Fed. R. Civ. P. 56, see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-51 (1986); Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). Once the movant has demonstrated that no genuine factual dispute stands in the way of a judgment entry, the burden shifts to the resisting party to present specific admissible evidence showing a genuine dispute on the issue, precluding judgment. City of Mount Pleasant v. Associated Elec. Coop., 838 F.2d. 268, 271-72 (8th Cir. 1988).

The parties do not dispute the following facts. Defendant BBC is an Iowa corporation with its principal place of business in Burlington, Iowa. BBC manufactures and imports wicker and plastic products. In 1995, Newberry began her employment with BBC in its Credit and Collections Department. She became Office Coordinator in 1999; in 2000 she began working as Office Manager. In 2000, Wal-Mart was BBC's largest customer, accounting for over 55% of its revenue. In November of 2000 Wal-Mart informed BBC that it was consolidating products. Wal-Mart discontinued its company-wide account with BBC, allowing individual stores to order directly from BBC. In 2001, BBC's sales to Wal-Mart dropped by 46%. In 2002, BBC's sales to Wal-Mart dropped by 36%. From 2000 to 2007 BBC's overall sales dropped by 50 %. BBC reduced the number of its employees, froze cost of living increases for some employees, reduced the salaries of three executives, and began eliminating manufacturing capacity and fixed

overhead expenses. When BBC eliminated plaintiff's Office Manager position in 2003,Newberry transferred to the Shipping Department, where she worked in the middle management position of Shipping Coordinator. At the end of 2006, there were two other middle managers: Electronic Data Interchange Manager Teresa Klein and Systems Manager Jason Thompson. BBC terminated plaintiff's employment on February 14, 2007, when she was fifty-three years old. Of the three middle managers, BBC retained only Teresa Klein. Klein is nine years younger than Newberry. BBC subsequently hired forty-six-year-old Diane Hall.

Defendant contends it is entitled to the entry of summary judgment in its favor because plaintiff's lay-off was the result of a bona fide RIF (reduction in force) and not because of her age.

Newberry has generated fact questions concerning BBC's motivation for terminating Newberry's employment and whether age was a motivating factor in the decision. Questions remaining for trial include but are not limited to whether a BBC decision-maker or decision-makers made an age-related comment or comments concerning her, what duties were performed by the new-hire Hall, and whether BBC policy required it to offer to Newberry the position ultimately filled by Hall.

The court denies BBC's motion for summary judgment and refers this case to Magistrate Judge Ross Walters to determine whether a settlement conference should be scheduled and, if so, to schedule a settlement conference.

IT IS SO ORDERED.

Dated this 30th day of January, 2009.

/s/ Charles R. Wolle

CHARLES R. WOLLE, JUDGE
U.S. DISTRICT COURT